84-406

Office-Supreme Court, U.S.
FILED
OCT 17 1984
ALEXANDER L. STEVAS,
CLERK

~~No. 84-104~~

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD. AND LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

BRIEF OF RESPONDENT LOS ANGELES MEMORIAL COLISEUM COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAXWELL M. BLECHER
HOWARD F. DANIELS
BLECHER, COLLINS & WEINSTEIN
611 West Sixth Street
Los Angeles, CA 90017
(213) 622-4222

Attorneys for Los Angeles Memorial Coliseum Commission

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Questions Presented	1
Counterstatement of The Case	1
The Facts	2
REASONS FOR DENYING THE WRIT	6
I.	
The application of Sherman § 1 to sports leagues has posed no difficulties which would justify deviation from entrenched precepts of antitrust law	6
II.	
The rule of reason was properly applied by the trial court	14
III.	
Oakland's venue arguments are both factually and legally unsound	16
A. Financial Bias of the Los Angeles Jurors	17
B. Representative Jury	20
CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases

Acme Precision Products, Inc. v. American Alloys Corp,. 484 F.2d 1237 (8th Cir. 1973) 15

American Football League v. NFL, 205 F.Supp. 60 (D.C. Md. 1962) aff'd. 323 F.2d 124 (4th Cir. 1963) 15

Associated Press, Inc. v. United States, 326 U.S. 1 (1945) 11

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 2, 9, 10

Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971) 19

City of Cleveland v. Cleveland Electric Illuminating Co., 538 F.Supp. 1240 (N.D. Ohio 1980) 21

Commonwealth Coating Corp. v. Ohio, 393 U.S. 145 (1968) reh. denied 393 U.S. 1112 (1969) 19

Coniglio v. Highway Services, Inc., 495 F.2d 1286 (2d Cir. 1974), cert. denied 419 U.S. 1022 (1974) 15

Copperweld Corp. v. Independence Tube Corp., 104 S.Ct. 2731 (1984) 2, 12, 13

Dennis v. United States, 339 U.S. 162 (1950) reh. denied, 339 U.S. 950 (1950) 18

Duren v. Missouri, 439 U.S. 357 (1979) 20

Fishman v. Wertz, 1981-2 Trade Reg. ¶ 64,378 (N.D. Ill. 1981) 15

Groppi v. Wisconsin, 400 U.S. 505 (1971) 20

Hecht v. Pro Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), cert. denied 436 U.S. 956 (1978) 15

Holt v. United States, 218 U.S. 245 (1910) 17

International Boxing Club v. United States, 358 U.S. 242 (1959) 15

Table of Authorities

Page

Cases

Levin v. National Basketball Association, 385 F.Supp. 149 (S.D.N.Y. 1974) 12

Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977) ... 12

Murphy v. Florida, 421 U.S. 794 (1975) 17

National Collegiate Athletic Association v. Board of Regents, 104 S.Ct. 2948 (1984) 2, 6, 8

National Society of Professional Engineers v. U.S., 435 U.S. 679 (1978) 16

Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) 12

North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1982) cert. denied 459 U.S. 1074 (1982) 6, 11, 12

Penn Power & Light Co. v. Gulf Oil Co., 270 Pa. Super. 514, 411 A.2d 1203 (1979) cert. denied 446 U.S. 966 (1980) 19

Peters v. Kiff, 407 U.S. 493 (1972) 20

Philadelphia World Hockey Club. v. Philadelphia Hockey Club, 351 F.Supp. 462 (E.D. Penn. 1972) ... 15

Pinder v. Hudgins Fish Co., Inc., 570 F.2d 1209 (5th Cir. 1978) 15

Royal Indemnity Co. v. City of Erie, 372 F.Supp. 1137 (W.D. Penn. 1974) 18, 19

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 5, 10

Smith v. Phillips, 455 U.S. 209 (1982) 18

Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) 12

Spies v. State of Illinois, 123 U.S. 131 (1887) 17

Table of Authorities

Page

Cases

Standard Oil Co. v. Federal Energy Administration, 465 F.Supp. 274 (N.D. Ohio 1978) aff. 612 F.2d 1291 (Temp. Emergency Ct. of App. 1979) 5

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) ... 20

Tumey v. Ohio, 273 U.S. 510 (1927) 19

U.S. v. Realty Multi-List, 629 F.2d 1351 (5th Cir. 1980) 5

United States v. Brown, 540 F.2d 364 (8th Cir. 1976) .. 18

United States v. Guzman, 337 F.Supp. 140 (S.D.N.Y. 1972), aff'd. 468 F.2d 1245 (2d Cir. 1972) cert. denied 410 U.S. 937 (1973) 20

United States v. Topoco Associated, Inc., 405 U.S. 596 (1972) 7

United States v. Wood, 299 U.S. 123 (1936) reh. denied, 299 U.S. 624 (1937) 19

Virginia Electric and Power Co. v. Sun Shipbuilding & Dry Dock Co., 389 F.Supp. 568 (E.D.Va. 1975) ... 19

Withrow v. Larkin, 421 U.S. 35 (1975) 19

Statutes

28 U.S.C. §1861 20

No. 84-104

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD. AND LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

BRIEF OF RESPONDENT LOS ANGELES MEMORIAL COLISEUM COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether separately owned and operated business entities which comprise the National Football League and which compete economically can agree to divide territories with a concededly anticompetitive purpose and effect, with complete immunity from Rule of Reason scrutiny under Section 1 of the Sherman Act.

COUNTERSTATEMENT OF THE CASE

Although loath to acknowledge it, the NFL owners seek from this Court nothing less than a blanket exemption from the application of Section One of the Sherman Act. In deference to the "unique" attributes of a sports league, the courts below refrained from striking down the NFL

owners' *per se* illegal agreement to carve out exclusive markets and instead applied traditional Rule of Reason standards. Not satisfied with the opportunity thus afforded them to prove that their conduct had redeeming virtues to offset its obvious anticompetitive impact, the NFL owners now seek to escape even from Rule of Reason review. Their petition does not deserve serious consideration.

The only issue presented by the NFL's petition is whether the necessity to cooperate to market the product warrants total immunity or can be accounted for under a Rule of Reason analysis. This Court and the courts of appeal have uniformly opted for a Rule of Reason review in every case which has presented this question. The courts below followed the directive of the Court in *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979), and the validity of their approach was confirmed last term by the decisions in *National Collegiate Athletic Association v. Board of Regents,* 104 S.Ct. 2948 (1984) and *Copperweld Corp. v. Independence Tube Corp.,* 104 S.Ct. 2731 (1984).

The NFL's quest for special immunity is properly addressed to Congress, where in fact the petitioners have mounted an extensive but entirely unsuccessful lobbying campaign.

THE FACTS

This litigation commenced in September, 1978 when respondent Coliseum filed suit against each of the NFL clubs, seeking injunctive relief which would prohibit them from enforcing Rule 4.3 of their Constitution and By-Laws. Rule 4.3 provided that a club owner wishing to transfer to a "neutral" territory had to obtain approval of three-quarters of the other NFL owners. However, if the owner wished to move into another owner's territory, the vote of approval had to be unanimous, thus enabling an owner to

veto the entry of another club into "his" territory. Such a rule had been in the NFL Constitution since at least the 1920's. The evidence at trial demonstrated that the historic purpose of the rule was to protect one NFL firm from economic competition from another club in the same territory. *E.g.*, 13 Tr.2d 2321; Px. 365; 13 Tr.2d 2322-23; Px. 366; 31 Tr.2d 7051-52; 31 Tr.2d 7079-82.

Three weeks after the Coliseum filed its complaint, the NFL owners held a meeting in Chicago. Following a discussion of the Coliseum's lawsuit, the owners voted to amend Rule 4.3 to eliminate the telltale double standard and require that any move would be subject to approval by three-fourths of the owners. The evidence revealed that the amendment was adopted not because the historic purpose of the rule was suddenly abandoned, but because the owners were told by the Commissioner and their attorneys that there was no defense to the Coliseum's lawsuit. Px. 3; 13 Tr.2d 2364; 22 Tr.2d 4557-58. Px. 191. See Court of Appeals discussion, App. A, 2a.[1]

The trial further established that NFL firms which operate in the same geographic area compete across a wide spectrum of business activities. Two NFL firms in the same territory (*e.g.*, New York or Los Angeles) compete with respect to gate receipt revenue, radio broadcasting revenue, preseason television revenue, employment of scouts, players, coaches and other management personnel, merchandise revenue and media space.

Thus, the use of Rule 4.3 to prevent the Raider transfer eliminated competition between the Rams and the Raiders in Southern California. Equally important, the very existence of the rule was shown to have a far broader impact.

---

[1]References to the Ninth Circuit's opinion, contained in Appendix A of the NFL's petition, are denoted by "App. A-"; references to the District Court's opinions, contained in Appendices B, C and D of the NFL's petition, are similarly denoted.

In the absence of Rule 4.3, each NFL firm would be a potential competitor of every other NFL firm. The firms would compete with each other with respect to those markets which could support more than one NFL club, and each of the 28 firms would face the potential of entry into "its" territory. *E.g.*, 31 Tr.2d 7051-52.

The anticompetitive purpose and effect of Rule 4.3 were amply demonstrated at trial and are not challenged by petitioners. Rather, the NFL clubs seek to insulate Rule 4.3 from judicial review under the antitrust laws by claiming that the NFL clubs constitute a "single enterprise". Absent from the NFL's petition, however, is the factual description of the NFL clubs upon which any such claim must be evaluated. The NFL is an unincorporated association consisting of 28 separate firms, each of which operates a professional football club. The NFL Constitution itself states that "the purposes and objects for which the League is organized are: a) to promote and foster the primary business of League members, each member being an owner of a professional football club". 13 Tr.2d 2312.

Each NFL firm is separately owned. In fact, the NFL constitution forbids an owner from having any financial interest in any other NFL firm. Each NFL firm is a separate legal entity — some are structured as corporations, others are partnerships and a few are sole proprietorships. App. A. 12a.

The NFL firms do not share profits or losses. Each owner is free to dispose of all profits in any manner he or she chooses. The clubs do not share any revenues from local television, radio, concessions, merchandise sales, parking or private box rentals. Nor do the firms share individual operating expenses, which vary widely from club to club. Each firm maintains its own books and records and financial

statements, and the NFL firms do not exchange this data among themselves.

Each NFL firm owner makes its own business decisions, including ticket prices, player acquisitions, player salaries, hiring of coaching and administrative personnel, operating procedures, terms of stadium leases, negotiation of radio and preseason television contracts and acquisition of physical facilities.

No NFL firm has any liability for the contractual obligations or debts of any other NFL firm.

Because each NFL firm is separately owned and operated, and does not share profits or losses, there are wide variations in net profits among the NFL clubs.

In sum, the NFL clubs are separate business entities by all of the accepted legal and economic criteria. In fact, the only structural difference between the NFL firms and competitors in any other industry is that the NFL firms must agree upon certain mechanical matters, such as hiring referees, adopting rules of play and adopting schedules, in order to play games. The need for this type of limited cooperation is hardly unique to sports leagues: competitors in various industries are required by the nature of the business to cooperate in certain aspects. *E.g.*, oil companies must make crude oil and product exchanges (*Standard Oil Co. v. Federal Energy Administration*, 465 F.Supp. 274 (N.D. Ohio 1978 *affirmed* 612 F.2d 1291 (Temp. Emergency Ct. of App. 1979)); airlines must share ticketing and airport facilities; telecommunications companies must share transmission lines. In fact, such cooperation is necessary in any industry which conducts transactions requiring a buyer and seller, *e.g.*, realtors (*U.S. v. Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980); or stock brokers (*Silver v. New York Stock Exchange*, 373 U.S. 341 (1963)).

REASONS FOR DENYING THE WRIT

The Ninth Circuit's decision employs settled antitrust principles to arrive at a result which is perfectly consistent, not only with the applicable decisions of every other Circuit, but with the recent decisions of this Court. The application of the antitrust laws to sports leagues has posed no particular difficulties for the courts, which have consistently applied the Rule of Reason to evaluate the claims of leagues that their unique structure might justify conduct which would be condemned out of hand in any other industry. Only last term this Court confirmed that sports leagues cannot evade scrutiny under the antitrust laws merely because they must cooperate to produce games. *National Collegiate Athletic Association v. Board of Regents,* 104 S.Ct. 2948 (1984). Even prior to the *NCAA* decision, the Court denied *certiorari* in *North American Soccer League v. NFL,* 670 F.2d 1249 (2d Cir. 1982) *cert. denied,* 459 U.S. 1074 (1982), wherein the NFL presented the identical question for review.

I.

THE APPLICATION OF SHERMAN § 1 TO SPORTS LEAGUES HAS POSED NO DIFFICULTIES WHICH WOULD JUSTIFY DEVIATION FROM ENTRENCHED PRECEPTS OF ANTITRUST LAW

The sole issue presented for review[2] is the appropriate treatment under Sherman § 1 of a sports league's division of territories. The NFL's contention is that a sports league has such unique attributes that the concerted division of markets into exclusive territories, normally condemned

---

[2]This brief also addresses on behalf of both respondents the motion advanced by the City of Oakland that due process required a jury composed differently than the one selected by petitioners themselves.

under a *per se* rule because of the manifest anticompetitive effects,[3] should be deemed *per se legal* as a matter of law.

The heart of the NFL's contention is that its division of territories has certain procompetitive effects, and in fact is actually a necessity for the operation of a sports league. The courts below did not ignore this assertion — on the contrary, they responded to it by refraining from application of the normal *per se* rule, putting respondents to the burden of proving that Section 4.3 was anticompetitive under the Rule of Reason.[4]

The courts below responded properly to the NFL's claim for special treatment: they simply gave the NFL the opportunity to prove its contentions. The NFL argument is essentially a *factual* assertion that its "unique" structure makes a division of territories necessary or procompetitive. At the trial, under Rule of Reason instructions expressly tailored to fit its contentions,[5] the NFL sought to demonstrate its assertions. There was a complete failure of proof. The "procompetitive" virtues turned out to be profit maximization and incentive for investment, the classic claims

---

[3]*E.g., United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

[4]The Court of Appeals refused to "grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the Rule of Reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws". App. A, 13a, n.4.
Recognizing the applicability of Sherman § 1 to the NFL, Congress has twice granted limited exemptions – for the merger with the AFL and for joint television negotiations. But Congress has rebuffed the NFL's intensive lobbying campaign for a blanket exemption from Sherman § 1.

[5]32 Tr.2d at 7216-18.

made for any concerted effort to circumvent competition. *E.g.*, 31 Tr. 2d 7051-52; Px. 367; see NFL Petition, p. 13.[6]

No evidence at all was adduced to show that the NFL could not produce games without a division of territories. Indeed, common sense suggests that the NFL can function perfectly well if each team selects its own home city,[7] and the two and one-half years since entry of the permanent injunction have not yet "spelled the end of sporting leagues", as petitioners solemnly warn. NFL Petition, p. 18.

The NFL never succeeded in making the vital connection between the undisputed need to co-produce games and the asserted need to co-determine each club's home site. Even if such a necessity existed, the necessity for co-production is hardly unique to the NFL, or even to sports leagues. The claim has never yielded an antitrust exemption; rather the courts have always relied upon the flexibility of a Rule of Reason analysis.

In fact, this Court last term squarely rejected precisely the same argument advanced so persistently by the NFL. *National Collegiate Athletic Association v. Board of Regents,* 104 S.Ct. 2948 (1984) is dispositive of petitioners' argument. The NCAA is an unincorporated association of schools, just as the NFL is an association of separately owned and operated clubs. The NCAA defended its television plan as procompetitive because of the integration of functions necessary to market football games. This, of course, is the NFL's argument.

---

[6]As the Court of Appeals correctly noted, this Court has long rejected the notion that "ruinous competition" is an acceptable defense. App. A, 22a. If investment in NFL clubs is not sufficiently attractive in an open market (a ridiculous premise, in any event), petitioners must accept the judgment of the marketplace. *NCAA, supra* at 2969.

[7]See the trial court's incisive discussion, App. D, 88a.

This Court agreed that *NCAA* involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all". *NCAA, supra*, at 2961. However, the Court did not even pause to consider the notion that this fact justifies complete exclusion from judicial review under the Sherman Act. Instead, the Court held that the NCAA's television plan should be evaluated under the Rule of Reason, thus enabling the fact-finder the evaluate the procompetitive justifications offered by the NCAA *Id.* at 2960-62.

NCAA definitely establishes that the necessity to cooperate to market NFL football warrants Rule of Reason treatment, but not the complete exemption sought by the NFL. Indeed, the Court expressly noted that the NCAA has a stronger need to market cooperatively than do professional leagues. *Id.* at 2961.

NCAA was in turn merely an application to the football industry of the general principles established in *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979). In *Broadcast Music,* the Court considered the appropriate treatment for ASCAP's blanket license, which effectively allowed companies to fix prices. Like the NFL, the defendants argued that they were a joint venture marketing a unique product which could be sold only with the co-operation of the individual composers. The Supreme Court agreed that the blanket license was a necessity if the product was to be marketed at all. *Id.* at 22-23.

The Court was thus faced with the question of what effect to give to the "defense" that the challenged conduct is essential, *i.e.,* that it is necessary to cooperate to produce the product. The answer was to evaluate the conduct under the Rule of Reason rather than a *per se* approach because "the agreement on price is necessary to market the product at all." *Id.* at 23. The Court most definitely did *not* hold, or

even intimate, that the necessity for ASCAP members to cooperate was a complete bar to the application of § 1.

The NFL cannot even make an argument as strong as ASCAP's. The conduct challenged in *Broadcast Music* — the blanket license — was *itself* necessary to market the product. However, the NFL never showed, as a matter of either logic or evidence, that a division of territories is needed to produce NFL football. The only justification for applying the Rule of Reason in this case is that the NFL must cooperate *in other ways* (*e.g.*, hiring referees) to produce games. App. A 16a. Surely it therefore follows that if ASCAP's conduct was subject to Rule of Reason scrutiny, so was the NFL's.

NCAA and *Broadcast Music* built in turn on several of this Court's seminal antitrust decisions. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), also rejects the contention that practices essential to the functions of a joint venture are rendered exempt from any sort of review under Sherman § 1. The Exchange had a by-law prohibiting members from having private wire connections with nonmembers without the approval of the Exchange, and it ordered its members to discontinue private lines to the plaintiff. The opinion's description shows unmistakably that the stock exchange was an "economic entity", producing a product quite distinct from that of its members. *Id.* at 359.

Like the NFL clubs, the individual members of the Exchange could not create their product without cooperating with each other. In fact, that truism gave rise to the suit because the "disconnected" member was effectively put out of business. *Id.* at 347-349. In spite of the need for co-production the members of the Exchange were held subject to review under the Sherman Act.

In *Associated Press, Inc. v. United States*, 326 U.S. 1 (1945), the Court again confronted a single enterprise claim. The product AP produced and sold was not that of any one member but the joint result of the effort of all its members in collecting news and redistributing news. 326 U.S. at 26. Under AP's by-laws, strikingly similar to the NFL's, no one competing with an old member was eligible for membership without the consent of its member competitor. Should the old member object to admission, approval had to be given by a majority vote of the regular member. The Court rejected AP's claim that the necessity for cooperation gave rise to an exemption from Sherman § 1.

This traditional approach to adjudicating co-production claims has been applied with the same force in the sports field. Claims of exemption have been routinely rejected in favor of Rule of Reason analysis. In *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982). The Second Circuit recently and emphatically rejected the NFL's effort to create such a "loophole" in the Sherman Act:

> "The characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition. To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.
>
> * * *
>
> The sound and more just procedure is to judge the legality of such restraints according to well-recognized

> standards of our antitrust laws rather than permit their exemption on the ground that since they in some measure strengthen the league competitively as a "single economic entity", the combination's anticompetitive effects must be disregarded."

Id. at 1257-58 (footnote omitted).

This Court denied *certiorari* in *NASL,* where the NFL's petition presented the identical issue raised here. *NASL v. NFL,* 459 U.S. 1074 (1982).[8]

Petitioner's description of "litigation chaos" (p. 7) is simply not an accurate perception of the state of the law. Following this Court's lead, the circuits have uniformly responded to the NFL's "unique nature" claim by rejecting its bid for *a priori* immunity while agreeing to apply the Rule of Reason in lieu of *per se* treatment. *Mackey v. National Football League,* 543 F.2d 606, 618 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1180 (D.C. Cir. 1978); *NASL v. NFL, supra; LAMCC v. NFL,* App.A.

Under traditional Rule of Reason analysis, the courts have upheld sports league rules which have no anticompetitive effects and which were reasonably required to effectuate the operations of the league. *E.g., Neeld v. National Hockey League,* 594 F.2d 1297 (9th Cir. 1979); *Levin v. NBA,* 385 F.Supp. 149 (S.D.N.Y. 1974). Thus, the NFL does not need the blanket immunity it seeks in order to preserve rules which have legitimate uses.

The solitary authority petitioners rely upon for their immunity argument is *Copperweld Corp. v. Independence Tube Corp.,* 104 S.Ct. 2731 (1984). *Copperweld* simply

---

[8]Justice Rehnquist's dissent was based only upon the perceived procompetitive benefits of the rule at issue and plainly distinguished a league rule restraining inter-team competition. 103 S.Ct. at 500.

confirms the appropriateness of recognizing the capability of NFL firms to conspire with one another.

Copperweld's holding concerning the inability of a parent corporation and its wholly-owned subsidiary to conspire is predicated on their identity of interests arising from common ownership, and the absence of "a sudden joining of two independent sources of economic power . . .". *Id.* at 2742. By contrast, each of the NFL firms is a separate unit of economic power, pursuing its own interests. The NFL clubs are separately owned and managed, and do not share profits or losses. Thus, unlike a parent and wholly-owned subsidiary, each NFL club has a distinct economic interest, which frequently can place it at odds with another NFL club. Unlike a parent and subsidiary, a dollar placed in the coffers of one NFL club (*e.g.*, the Raiders) can frequently be at the expense of another club (*e.g.*, the Rams).[9] Thus, the joint decision of the club owners to allocate territories does represent the "sudden joining of [28] independent sources of economic power". See Court of Appeals discussion, App. A, 11a-12a.

The mere fact of separate ownership is sufficient to remove the NFL clubs from the ambit of *Copperweld*. The common ownership of a parent and its subsidiary is the touchstone of *Copperweld* because it is common ownership which provides, and guarantees, the identity of interest which makes a Sherman Act "conspiracy" legally impossible. 104 S.Ct. at 2742.[10]

---

[9]The NFL clubs share certain revenue streams but not others. There are significant differences among the clubs in terms of net annual profits, which are not shared.

[10]The *Copperweld* majority carefully limited its holding to a parent and its *wholly* owned subsidiary. The NFL, with its separately owned and operated clubs, lies at the opposite end of the continuum.

II.

THE RULE OF REASON WAS PROPERLY APPLIED BY THE TRIAL COURT

The NFL's legitimate interest in cooperating to produce games is fully accommodated by use of the Rule of Reason. Petitioner's only cavil concerning the manner in which the Rule of Reason was applied in the trial court relates to the issue of relevant product market.[11] According to the NFL, respondents failed to place sufficient evidence before the jury on this question. That the NFL should suggest to this Court that it review routine questions of sufficiency of evidence, particularly those already passed upon by the Court of Appeals, speaks eloquently of the absence of any issue warranting grant of *certiorari*.

The decision below selectively reviews some of the relevant market evidence placed before the jury, but its description is by no means exhaustive of the evidence presented to the jury to show that NFL games have no close substitutes.[12]

---

[11]Respondents contended that the relevant market was major league professional football, while petitioners argued that the market consisted of all forms of entertainment and recreation. The trial court's instructions to the jury carefully described both the concept itself and the criteria for deciding the relevant market issue. 32 Tr.2d 7212-15.

[12]*E.g.*, 14 Tr.2d 2550 (Rozelle testimony as to essential differences among professional sports); Px 365 (Commissioner Bell's testimony on Rule 4.3 as device to protest NFL owners); 13 Tr.2d 2322 (Rozelle testimony to same effect); 13 Tr.2d 2331; 15 Tr.2d 2722-74; 2796-98 (exclusive territories vital to NFL owners); Px 367 (local competition for NFL owners consists of other NFL teams); Px 363 (Rozelle testimony that NFL is a monopoly). 13 Tr.2d 2476 (NFL team gives community unique national status); Px 48 (motion pictures and commercial sports in different markets); Px 51, page IV-11 (college football does not compete with NFL); 28 Tr.2d 6082-83 (college football has different fan base).

Relevant market is peculiarly a fact issue for the jury, one presenting no question which would warrant grant of *certiorari*. *International Boxing Club v. United States*, 358 U.S. 242 (1959); *Pinder v. Hudgins Fish Co., Inc.*, 570 F.2d 1209, 1219-20 (5th Cir. 1978); *Acme Precision Products, Inc. v. American Alloys Corp.*, 484 F.2d 1237 (8th Cir. 1973).

Moreover, judicial experience in this area overwhelmingly supports respondents' contention that NFL football has no close substitutes. This Court need look no further than its own finding last term that college football is a unique product. *NCAA, supra*, at 2966. *See International Boxing Club v. United States*, 358 U.S. 242 (1959) (relevant market is *championship* boxing); *Hecht v. Pro Football, Inc.*, 570 F.2d 982, 988 (D.C. Cir. 1977), *cert. denied* 436 U.S. 956 (1978) (relevant market is professional football); *American Football League v. NFL*, 205 F.Supp. 60, 65 (D.C.Md. 1962) *aff'd.* 323 F.2d 124 (4th Cir. 1963) (market is major league professional football); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F.Supp. 462, 501 (E.D. Penn. 1972) (relevant market is major league professional hockey); *Fishman v. Wertz*, 1981-2 Trade Reg. ¶ 64,378 (N.D. Ill. 1981) (NBA basketball is a separate product market).

Ironically, in *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir. 1974), *cert. denied* 419 U.S. 1022 (1974), the *plaintiff* argued for a "general entertainment market", while the *NFL* contended that there were no competitors to the presentation of NFL games. The court agreed with the NFL, rejecting the "entertainment market" concept as "so broadly defined as to render that concept [relevant market] all but meaningless . . .". *Id.* It is that meaningless "entertainment" market which the NFL advocated in the courts below.

Moreover, in the unique circumstances of this case, relevant market was not critical to the analysis required to

condemn Rule 4.3.[13] A division of territories completely eliminates *all* forms of competition, be it price, output, quality or any other form competition might take. "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement'. *Professional Engineers,* 435 U.S. at 692, 98 S.Ct. at 1365." *NCAA, supra* at 2965 (footnote omitted).[14]

III.

OAKLAND'S VENUE ARGUMENTS ARE BOTH FACTUALLY AND LEGALLY UNSOUND

Oakland persistently argued below that a change of venue was required because of pretrial publicity. Its position was rejected because it failed "to show anything beyond the slightest speculation that publicity infected the fairness of the trial". Court of Appeals' opinion, Oakland Appendix A, 32a. Now Oakland has entirely abandoned its publicity argument, and its seeks *certiorari* on the basis of two throwaway arguments rejected by every judge to have considered them, including the dissent below. *Id.,* 50a - 51a.

---

[13]The NFL has never seriously argued that Rule 4.3 promoted competition with other products. Instead the NFL has argued that Rule 4.3 is "inherently" procompetitive because it is needed for the very existence of the league. This claim can be evaluated based upon evidence of the nature and function of the NFL itself, without reference to relevant market.

[14]Oakland's petition quibbles over the trial court's refusal to give a "public service" instruction. Even leaving to one side the dubious factual premise that football has public service aspects comparable to the professions, this Court has emphasized that such considerations play no role in a Rule of Reason analysis. *National Society of Professional Engineers v. U.S.,* 435 U.S. 679 (1978); *NCAA, supra* at 2960-61, N. 23.

At the outset it must be stressed that a change of venue is committed to the broad discretion of the trial judge, who is best situated to evaluate the myriad of subtle factors which bear on the ultimate determination as to whether the jury was impartial. *Holt v. United States*, 218 U.S. 245 (1910); *Spies v. State of Illinois*, 123 U.S. 131 (1887).

Indeed the Court has found a violation of due process in criminal cases only where defendant demonstrated actual prejudice or, in a limited number of extreme instances, in a "trial atmosphere that had been utterly corrupted by press coverage". *Murphy v. Florida*, 421 U.S. 794, 798 (1975).

Oakland's due process claim admittedly makes no effort to show actual prejudice, nor could it do so in the face of the trial court's "thorough cautionary actions" and the truly extraordinary *voir dire* process. Court of Appeals' decision, Oakland App. A, 32a.[15] Instead, Oakland contends that juror bias should automatically be inferred because some of the jurors resided in Los Angeles County and because *defendants* chose to exclude "football fans" from the jury. Neither contention has sufficient merit to justify this Court's attention.

A. Financial Bias of The Los Angeles Jurors.

Four of the eight jurors resided outside of Los Angeles County[16] and owned no property in Los Angeles County. Even as to the Los Angeles jurors, Oakland's argument is

---

[15]Solely to accommodate the defendants' professed concerns, the trial court administered a 48-page questionnaire prepared by the NFL, gave each side ten instead of the normal three peremptory challenges, dismissed for cause virtually every juror challenged by defendant (2 Tr.2d 63-134) and conducted an individual interview process which required seven full days. 2 Tr.2d - 9 Tr.2d.

[16]The Central District draws jurors from a population of 12,000,000 in seven counties. Several of the jurors resided 200 miles from the location of the Coliseum in downtown Los Angeles.

fictitious: the testimony showed that the Coliseum Commission is an independent government agency which has *never* received *any* taxpayer money. *E.g.*, 16 Tr.2d 3181. Contrary to Oakland's claim, no testimony was elicited to the effect that the failure to obtain the Raiders would lead to a tax increase.[17]

The legal support for Oakland's contention is equally meager, indeed non-existent. This Court has consistently refused to impute bias to an entire class of potential jurors merely because they hold a status tangentially related to the case at bar. *Dennis v. United States*, 339 U.S. 162 (1950) *reh. denied*, 339 U.S. 950 (1950) (federal government employees not biased as a matter of law in Communist's contempt trial); *United States v. Wood*, 299 U.S. 123 (1936) *reh. denied*, 299 U.S. 624 (1937) (government employees not disqualified in criminal cases); *Smith v. Phillips*, 455 U.S. 209 (1982) (applicant for job with District Attorney not biased).

In every case claiming that a group has an indirect financial stake in the outcome, the lower courts have uniformly rejected claims of implied bias. *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976) (no basis for disqualifying St. Louis residents where indictment alleged scheme to defraud city); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F.Supp. 1240 (N.D. Ohio 1980) (utility customers); *Royal Indemnity Co. v. City of Erie*, 372 F.Supp. 1137

---

[17]Indeed this Court can take judicial notice that the California Constitution, as amended by Proposition 13, forbids Los Angeles County from increasing property taxes. Calif. Const., Art. 13A, § 1.

Supervisor Hahn's deposition, referred to in Oakland's petition, discussed the advantages the Raiders would offer to the community in the context of refuting the NFL's principal defense at trial – that the Los Angeles political "establishment" would not support the Raider move on the terms negotiated by the Coliseum Commission. He never alluded to possible tax increases.

(W.D. Penn. 1974) (city taxpayers); *Virginia Electric and Power Co. v. Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568 (E.D.Va. 1975) (utility customers); *Penn Power & Light Co. v. Gulf Oil Co.*, 270 Pa. Super. 514, 411 A.2d 1203 (1979) *cert. denied*, 446 U.S. 966 (1980).

The cases relied upon by Oakland are inapposite because none involved taxpayers disqualified because of a potential indirect interest in the litigation. *Withrow v. Larkin*, 421 U.S. 35 (1975) (no violation of due process for medical examining board to investigate and adjudicate complaint); *Commonwealth Coating Corp. v. Ohio*, 393 U.S. 145 (1968) *reh. denied* 393 U.S. 1112 (1969) (member of arbitration panel was customer of one of parties to the arbitration); *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (9th Cir. 1971) (juror owned stock in defendant company). In *Tumey v. Ohio*, 273 U.S. 510 (1927), the principal authority relied upon by Oakland, the judge was disqualified because he had "a direct, personal, substantial pecuniary interest" in convicting a criminal defendant. Indeed, dicta in *Tumey* strongly imply that there is no due process issue raised by taxpayers serving as jurors in damage trial against municipalities. 273 U.S. at 528-29.

The rule Oakland seeks would require wholesale disqualification of entire classes of jurors in numerous cases because of minute and indirect interests. The Los Angeles jurors had no financial stake in the outcome merely by virtue of their status as property taxpayers.

This Court's observation in *United States v. Wood*, 299 U.S. 123, 148, is apt here:

> To impute bias as a matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary.

B. Representative Jury.

When Oakland raised this issue below, it claimed only that the Jury Selection and Service Act, 28 U.S.C. §1861, had been violated because there were no football fans on the jury. The argument floundered because that Act regulates a district court's own juror selection plan, *e.g., United States v. Guzman,* 337 F.Supp. 140 (S.D.N.Y. 1972), *aff'd.* 468 F.2d 1245 (2d Cir. 1972) *cert. denied,* 410 U.S. 937 (1973), not a party's own selection of jurors.

Now suddenly elevated to a "due process" claim, the contention is no less vacuous. It was the *defendants* who systematically exercised their own peremptory challenges to strike football fans from the jury. One can only speculate why the NFL did not want NFL fans on the jury. In any event, defendants cannot convert their own tactical decision into a bootstrap argument that they were denied due process.

The cases cited by Oakland all involve exclusion of a class of jurors *by court officials. Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946) (court clerk and jury commissioner excluded wage earners); *Groppi v. Wisconsin,* 400 U.S. 500 (1971) (state law prohibited change of venue); *Peters v. Kiff,* 407 U.S. 493 (1972) (jury list excluded blacks).

A claim of violation of the "fair cross-section" requirement necessitates proof of three elements: 1) the group alleged to be excluded must be a "distinctive" group in the community; 2) the representation of this group in venires from which juries are selected must be shown to be unfair and unreasonable in relation to the number of such persons in the community; and 3) this under-representation must be due to systematic exclusion of the group in the court's jury selection process. *Duren v. Missouri,* 439 U.S. 357, 364-68 (1979). Oakland has not sought to shoulder any of these three burdens, nor could it do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

BLECHER, COLLINS & WEINSTEIN
MAXWELL M. BLECHER
HOWARD F. DANIELS
Attorneys for Respondent
Los Angeles Memorial
Coliseum Commission